AMBANK (M) BHD

v.

PANG TEE CHIANG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEALS NO: W-02-1503-2009 & W-02-1590-2009]
6 APRIL 2011

HIRE PURCHASE: *Hire Purchase Agreement - Misrepresentation - Allegation of - Whether owner/dealer misrepresented to the hirer that the vehicle was new or second hand - Whether hirer aware and accepted that vehicle an imported used car - Whether hirer complied with terms of payment of deposit - Whether sums due to dealer*

HIRE PURCHASE: *Hire Purchase Agreement - Breach of warranty - Allegation of - Seizure of vehicle by Royal Malaysian Customs & Excise Department - Whether there was a violation of implied warranty of quiet possession - Whether owner liable*

HIRE PURCHASE: *Hire Purchase Agreement - Guarantee - Liability of guarantor - Guarantor signed agreement not as mere guarantor but also principal hirer - Hire-Purchase Act 1967, s. 22 - Whether applicable - Whether guarantee agreement valid and enforceable*

This case revolved around the hire purchase of a motorcar, Mercedez Benz W220 S320L. The dealer sold the vehicle to the hirer. The hirer entered into a hire purchase agreement where a deposit of RM289,250 was paid. The guarantor had by a guarantee guaranteed the payment of the monthly instalments by the hirer to the owner. Subsequently, the hirer found on the endorsement of the registration card of the said vehicle that it was an imported used car and refused to pay instalments. The said vehicle was seized by the Royal Customs & Excise Department for investigation. A year later, the Customs Department returned the said vehicle to the owner. The said vehicle was subsequently auctioned to a third party for a price of RM545,000, leaving a shortfall of RM380,548.07. In one civil suit, the owner filed a claim against the guarantor for the shortfall

outstanding under the said hire purchase agreement after disposal of the said vehicle but it was dismissed by the High Court. In another civil suit, the hirer filed a claim against the owner in the High Court for misrepresentation and breach of warranty, and the owner counterclaimed against the hirer for the shortfall outstanding under the said hire-purchase agreement after disposal of the said vehicle. The hirer's claim was dismissed and the owner's counterclaim was allowed by the High Court.

Two appeals were heard together before this court, namely Appeal No. W-02-1503-2009, an appeal by the owner against the guarantor to the hire purchase transaction, and Appeal No. W-02-1590-2009, an appeal by the hirer of the said vehicle against the owner and the dealer. The issues that arose (i) whether the owner and/or the dealer misrepresented to the hirer that the said vehicle was new or second hand; (ii) whether the hirer had complied with the terms of payment of the deposit of RM289,250 to the dealer; (iii) what was the effect of the seizure of the said vehicle by the Royal Malaysian Customs and Excise Department (iv) whether the guarantee signed by the guarantor was void pursuant to s. 22 of the Hire Purchase Act 1967.

Held (allowing Appeal No W-02-1503-2009; dismissing Appeal No W-02-1590-2009)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The owner and/or the dealer had not misrepresented to the hirer on the status of the said vehicle. From the particulars recorded in the Registration Card dated 16 July 1999, the parties, in particular, the hirer, were well aware of the fact that the vehicle in question was an imported used car from the outset. Evidence also showed that the hirer had been in default of payment even before the Registration Card was forwarded to the hirer. Thus, the hirer's refusal to pay had nothing to do with the status of the vehicle. In the circumstances, regardless of what was held out on the documentation, it was evident on the facts that the hirer accepted that an imported used car was new. (para 10)

(2) As for the deposit payment between the hirer and the dealer, the amount due was RM289,250. The hirer had paid RM68,000. Cheques for the balance sum were issued twice but on both occasions, the cheques bounced. These sums

have not been paid by the hirer and there being no misrepresentation, these sums were therefore due to the dealer. This finding was clearly not in favour of the hirer. (paras 12 & 13)

(3) The hirer submitted that by reason of the seizure of the vehicle by the Customs Department, there was a violation of the implied warranty of quiet possession of the vehicle as provided for under s. 7(1)(a) of the Hire Purchase Act 1967. However, on the facts of this case, it was clear that the deprivation was caused by the Customs Department and not the owner; therefore the owner was not liable for the violation of the implied warranty. (paras 15 & 16)

(4) Section 22 of the Hire Purchase Act 1967 does not apply to cases where the guarantor besides being an ordinary guarantor to the transaction, also declared to undertake responsibilities or obligations of the principal debtor or principal hirer (in this case). The guarantor in this case signed the agreement not as a mere guarantor but also as a principal hirer. Thus, the requirement that the guarantee agreement must be signed by the guarantor in the presence of a Magistrate, a Commissioner for Oath or a Notary Public as stipulated under s. 22 of the Hire-Purchase Act 1967 was not applicable to the facts of the case. Therefore, the said guarantee agreement was valid and enforceable. (paras 21 & 26)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah kes mengenai sewa beli sebuah kereta, Mercedez Benz W220 S320L. Peniaga menjual kenderaan tersebut ke penyewa. Penyewa memasuki perjanjian sewa beli di mana deposit RM289,250 dibayar. Penjamin melalui jaminan telah menjamin bayaran ansuran bulanan oleh penyewa kepada pemilik. Penyewa menjumpai pada pengesahan kad pendaftaran kenderaan tersebut bahawa ia adalah kereta terpakai diimport dan kemudiannya enggan membayar ansuran-ansuran. Kenderaan tersebut dirampas oleh Jabatan Kastam & Eksais Diraja Malaysia untuk siasatan. Setahun kemudian Jabatan Kastam mengembalikan kenderaan tersebut kepada pemilik. Kenderaan tersebut kemudiannya telah dilelong kepada pihak ketiga untuk harga RM545,000, meninggalkan kekurangan RM380,548.07. Di dalam satu guaman sivil, pemilik

memfailkan tuntutan terhadap penjamin untuk kekurangan tertunggak di bawah perjanjian sewa beli tersebut selepas pelupusan kenderaan tersebut tetapi telah ditolak oleh Mahkamah Tinggi. Di dalam guaman sivil yang lagi satu, penyewa memfailkan tuntutan terhadap pemilik di Mahkamah Tinggi untuk misrepresentasi dan pelanggaran waranti tersirat, dan pemilik merayu balas terhadap penyewa untuk kekurangan tertunggak di bawah perjanjian sewa beli selepas pelupusan kenderaan tersebut. Tuntutan penyewa telah ditolak dan rayuan balas pemilik telah dibenarkan oleh Mahkamah Tinggi.

Dua rayuan telah didengar bersama-sama di hadapan mahkamah, iaitu Rayuan No. W-02-1503-2009, rayuan pemilik terhadap penjamin transaksi sewa beli dan Rayuan No. W-02-1590-2009, rayuan oleh penyewa kenderaan tersebut terhadap pemilik dan peniaga. Isu-isu yang timbul adalah (i) sama ada pemilik dan/atau peniaga telah memberi misrepresentasi kepada penyewa bahawa kenderaan tersebut adalah baru atau sudah diguna; (ii) sama ada penyewa telah mematuhi syarat-syarat bayaran deposit RM289,250 kepada peniaga; (iii) apakah kesan penyitaan kenderaan tersebut oleh Jabatan Kastam & Eksais Diraja Malaysia dan (iv) sama ada jaminan yang ditandatangani oleh penjamin terbatal di bawah s. 22 Akta Sewa Beli 1967.

Diputuskan (membenarkan Rayuan No W-02-1503-2009; menolak Rayuan No W-02-1590-2009)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Pemilik dan/atau peniaga tidak melakukan misrepresentsi kepada penyewa mengenai status kenderaan tersebut. Daripada butir-butir yang direkodkan di dalam Kad Pendaftaran bertarikh 16 Julai 1999, pihak-pihak, khususnya, penyewa, menyedari hakikat bahawa kenderaan yang dipersoalkan itu adalah kereta terpakai import dari awal lagi. Keterangan juga menunjukkan bahawa penyewa telah keingkaran membayar walaupun sebelum Kad Pendaftaran telah dikemukakan kepada penyewa. Oleh itu, keengganan penyewa untuk membayar tiada kena mengena dengan status kenderaan tersebut. Dalam keadaan tersebut, tanpa mengira apa yang telah dinyatakan di dalam dokumen, ia adalah terbukti pada fakta-fakta bahawa penyewa telah menerima bahawa kereta terpakai import adalah baru.

(2) Bagi bayaran deposit di antara penyewa dan peniaga, bayaran yang perlu dibayar adalah RM289,250. Penyewa telah membayar RM68,000. Cek-cek untuk jumlah baki telah dikeluarkan dua kali tetapi cek-cek tersebut ditolak dua kali. Amaun-amaun ini tidak dibayar oleh penyewa dan oleh kerana tiada misrepresentasi, amaun-amaun ini harus dibayar kepada peniaga. Penemuan ini jelas tidak memihak kepada penyewa.

(3) Penyewa berhujah bahawa oleh sebab penyitaan kenderaan tersebut oleh Jabatan Kastam & Eksais Diraja Malaysia, terdapat pelanggaran waranti tersirat milikan aman kenderaan tersebut seperti yang diperuntukkan di bawah s. 7(1)(a) Akta Sewa Beli 1967. Walau bagaimanapun, mengikut fakta-fakta kes, ia adalah jelas bahawa penafian dilakukan oleh Pejabat Kastam dan bukan pemilik; oleh itu pemilik tidak bertanggungjawab untuk pelanggaran waranti tersirat.

(4) Seksyen 22 Akta Sewa Beli 1967 tidak terpakai kepada kes-kes di mana penjamin selain daripada menjadi penjamin biasa kepada transaksi, juga mengisytiharkan untuk menjalankan tanggungjawab atau obligasi peminjam utama atau penyewa utama (di dalam kes ini). Penjamin di dalam kes ini telah menandatangani persetujuan bukan hanya sebagai penjamin tetapi juga sebagai penyewa utama. Oleh itu, keperluan persetujuan jaminan mesti ditandatangani oleh penjamin di hadapan seorang Majistret, Pesuruhjaya Sumpah atau Notari Awam seperti yang ditetapkan di bawah s. 22 Akta Sewa Beli 1967 tidak terpakai kepada fakta-fakta kes ini. Oleh itu, persetujuan jaminan tersebut adalah sah dan boleh dikuatkuasakan.

Legislation referred to:
Hire-Purchase Act 1967, ss. 7(1)(a), 22

(Civil Appeal No: W-02-1503-2009)
For the appellant - Hargopal Singh; M/s Hargopal Singh & Co
For the respondent - Mureli Navaratnam; M/s Mureli Navaratnam

(Civil Appeal No: W-02-1590-2009)
For the appellant - Mureli Navaratnam; M/s Mureli Navaratnam
For the respondent - Hargopal Singh; M/s Hargopal Singh & Co

[Appeals from High Court, Kuala Lumpur; Suit No: D7-22-183-2000; D7-22-210-2002 & D7-(D4)-22-1149-2002]

Reported by Suhainah Wahiduddin

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JUDGMENT

Ramly Ali JCA:

[1] There are two appeals before this court heard together, namely:

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(a) Appeal No. W-02-1503-2009:

an appeal by AmBank (M) Berhad, as the Owner of the vehicle in question against an individual, Pang Tee Chiang @ Phang Nyiok Pan, as the Guarantor to the hire-purchase transaction, against the decision of the Kuala Lumpur High Court in Civil Suit No. D7-22-210-2002 in dismissing the Owner's claim with no order as to costs; and

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(b) Appeal No. W-02-1590-2009:

an appeal by the Hirer of the said vehicle, Trade Ocean Exporters Sdn Bhd against AmBank (M) Berhad, as the Owner, and Ace Active Trade (M) Sdn Bhd, as the Dealer against the decision of the Kuala Lumpur High Court in Civil Suit No. D7-22-183-2000 which dismissed the Hirer's claim against the Owner and allowed the Owner's counter-claim against the Hirer.

E

Brief Facts

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[2] The facts in this case revolve around the hire-purchase of a motorcar, Mercedes Benz W220 S320L bearing registration number WGY 911. On 24 July 1999, the Dealer sold the vehicle to the Hirer at a purchase price of RM988,700. The Hirer had entered into a hire-purchase agreement on 24 July 1999 for 60 months commencing from 24 August 1999 at a monthly instalment of RM15,750. A deposit of RM289,250 was paid. The hire-purchase was therefore for a sum of RM700,000 with an interest of RM245,000 making it RM1,234,250 in total (including the deposit). The agreement specifies that the vehicle being hired is 'One Unit New Mercedes Benz W220 S320L'.

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[3] The guarantor had by a guarantee dated 24 July 1999 guaranteed the payment of the instalments by the Hirer to the Owner.

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[4] The Hirer defaulted the first two instalments (due on 24 August 1999 and 24 September 1999) and a 4th Schedule Notice of Intention to repossess was issued on 25 September

1999. Five days later (on 30 September 1999) the Hirer received the registration card of the said vehicle and found the endorsement on the card that the vehicle was an imported used car (kenderaan import terpakai). The Hirer then refused to pay the instalments.

[5] On 5 November 1999 the said vehicle was seized by the Royal Customs & Excise Department for investigation. On 9 December 2000 (slightly more than 1 year later) the Customs Department returned the said vehicle to the owner as their investigation disclosed no offence has been committed with regard to the said car.

[6] The owner took back the vehicle from the Customs Department and on 13 December 2000 issued the 5th Schedule Notice to the Hirer and the Guarantor. There was no response from the Hirer and the Guarantor. The vehicle was subsequently auctioned to a third party on 5 December 2001 for a price of RM545,000, leaving a shortfall of RM380,548.07 as at 11 March 2002.

[7] The Hirer filed a claim against the Owner *vide* Civil Suit No. D7-22-183-2000 for misrepresentation and breach of warranty and condition by the Owner resulting in the said hire-purchase agreement being void and thus a claim for refund of the alleged deposit of RM289,250 paid to the dealer. The Owner on the other hand filed its counter-claim against the Hirer for the shortfall outstanding under the said hire-purchase agreement after disposal of the said vehicle at RM380,548.07. The Hirer's claim was dismissed and the Owner's counter-claim was allowed by the Kuala Lumpur High Court.

[8] In the other case, (Civil Suit No. D7-22-210-2002) the Owner had filed a claim against the Guarantor under the guarantee agreement date 24 July 1999 for the shortfall outstanding under the said hire-purchase agreement after disposal of the said vehicle at RM380,548.07. This claim was dismissed by the court.

[9] At the trial at the High Court, all parties agreed that there are only three issues to be tried, as follows:

A (a) whether the owner and/or the dealer misrepresented to the Hirer that the said vehicle was new or second-hand?

(b) whether the Hirer had complied with the terms of payment of the deposit of RM289,250 to the dealer?; and

B (c) what is the effect of the seizure of the said vehicle by the Royal Malaysian Customs and Excise Department?

[10] On the first issue - the learned High Court judge found in favour of the owner that the owner and/or the dealer had not C misrepresented to the Hirer on the status of the said vehicle. At paras 7.9, 7.10 and 7.11 of her grounds of judgment the learned judge ruled:

> 7.9 However, that is immaterial on the facts of this case. Even D though the vehicle was not new, there was no misrepresentation. From the particulars recorded in the Registration Card dated 16 July 1999, it appears that the parties, in particular, the hirer, were well aware of the fact that the vehicle in question was an imported used car from the outset. There are two endorsements on the Registration E Card. One pertains to the fact that the vehicle was an imported used car while the other refers to the claim by the owner. The signature of the hirer also appears on the Registration Card. Since there are no other dates appearing on the Registration Card, it is reasonable for me to F conclude the endorsements and the hirer's signature must have been affixed on the Registration Card at or around the same date of registration on 16 July 1999.
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> 7.10 The evidence also show that the hirer had been in default of payment even before the Registration Card was forwarded G to the hirer. Although the hirer made protestations on the status of the vehicle upon receipt of the Registration Card, it is obvious that the refusal to pay had nothing to do with the status of the vehicle.
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> 7.11 In the circumstances, regardless of what was held out on H the documentation, it is evident on the facts that the hirer accepted that an imported used car was new. It would have been beneficial if evidence was led as to the difference in value between a brand new and an imported used Mercedes Benz W220 S320L. But since there is none, I can only find I that the hirer entered into the arrangements with the respective parties on the terms as appearing in the relevant documentation.

[11] This court is in full agreement with the learned judge's finding on this issue and decides not to interfere with it. A

[12] On the second issue: this issue is relevant between the Hirer and the Dealer. The amount due as deposit is RM289,250.00. The Hirer paid RM68,000. Cheques for the balance sum were issued twice but on both occasions, the cheques bounced. B

[13] Again on this issue, this court is in agreement with the learned judge's finding that these sums have not been paid by the Hirer and there being no misrepresentation, these sums are therefore due to the Dealer. This finding is clearly not in favour of the Hirer. C

[14] The third issue is on the effect of the seizure of the vehicle by the Royal Malaysian Customs and Excise Department. In this regard, the Customs Department seized the vehicle from the Hirer on 5 November 1999. Subsequently on 9 December 2000, the Customs Department returned the vehicle to the owner. A notice under the 5th Schedule was then issued by the owner to the Hirer and Guarantor on 14 December 2000 giving the Hirer the option of taking back the vehicle by settling the instalments that were in arrears or to purchase the vehicle by paying the full balance outstanding. This option was offered several times, but neither the Hirer nor the Guarantor responded. D E

[15] The Hirer submitted that by reason of the seizure of the vehicle by the Customs Department, there was a violation of the implied warranty of quiet possession of the vehicle as provided for under s. 7(1)(a) of the Hire-Purchase Act, 1967. F

[16] On this issue also, the learned judge found in favour of the owner ie, on the facts of this case, it is clear that the deprivation was caused by the Customs Department and not by the owner; therefore the owner is not liable for the violation of the implied warranty. On this issue the learned judge concluded that "in the circumstances, the basis of the claim of the Hirer is not sustainable". This court agrees with this finding. G H

[17] Apparently the learned judge's finding on all the three agreed issues were not in favour of the Hirer as well as the Guarantor. However, the learned judge went on to consider another issue raised by the Guarantor ie, whether the guarantee signed by Pang Tee Chiang @ Phang Nyiok Pan as the Guarantor on 24 July 1999 is void pursuant to s. 22 of the Hire-Purchase Act 1967. I

A The learned judge found that the guarantee agreement is void for non compliance with s. 22 and on this ground alone the owner's claim against the Guarantor in Civil Suit No. D7-22-210-2002 was dismissed.

B **[18]** Section 22 of the Hire Purchase Act 1967, provides as follows:

> Where a guarantor of a performance of the obligations of the hirer under a hire-purchase agreement enters into an agreement binding the guarantor:
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> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement; or
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> (b) to perform an obligation in respect of goods other than the goods comprised in the hire-purchase agreement,
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> the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

[19] The guarantor contended that, cl. 4 of the guarantee E agreement imposes further and other liabilities on the guarantor, that is the liability to "further indemnity the owner against all actions, proceedings, claims and demands whatsoever made by the Hirer arising out of any alleged warranty and/or representation or otherwise in respect of the goods." To the guarantor, this would F mean that the sum the guarantor may ultimately be liable for would exceed the sum due from the Hirer, in which case, the guarantee agreement must be witnessed by either a magistrate, a commissioner for oaths or a notary public as envisaged by s. 22.

G **[20]** The learned judge agreed with the guarantor and found that the said guarantee agreement was void and therefore the owner's claim against the guarantor was dismissed.

[21] This court is of the view that s. 22 of the Hire Purchase H Act 1967 is not applicable to the facts of the present case. Section 22 applies to "a guarantor of a performance of the obligations of the Hirer under the hire purchase agreement" ie, the guarantor entered into the guarantee agreement "as a guarantor". It does not apply to cases where the guarantor besides being an I ordinary guarantor to the transaction, also declares to undertake responsibilities or obligations of the principal debtor or principal hirer (in this case). The guarantor in this case signed the agreement not as a mere guarantor but also as a principal hirer.

[22] Clause 3 of the Guarantee Agreement provides as follows: A

> I/We hereby agree and confirm that all sums of moneys which may not be recoverable from me/us as guarantor by reason of any legal limitation, disability or incapacity on or of the Hirer, including (without limitation) any defect, informality or deficiency, in the powers of the Hirer to enter in the Hire Purchase Agreement or in the exercise of such powers which might be a defence between the Hirer and yourselves shall nevertheless be recoverable from me/us as if I/We had entered into the Hire Purchase Agreement with yourselves in place of the Hirer. B

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[23] Clause 11 of the Hire Purchase Agreement provides as follows:

> In the event that you take legal proceedings against me (the Hirer) in any matter arising out of or in connection with this Agreement, I agree to fully indemnify you against all legal expenses incurred by you in such proceedings on a full solicitors and client basis. D

[24] The undertakings by the guarantor under cl. 4 of the Guarantee Agreement correspond with the undertakings by the Hirer under cl. 11 of the Hire Purchase Agreement. Subject to cl. 3 of the Guarantee Agreement, the undertakings of the Hirer become the undertakings of the Guarantor, not as a guarantor *per se* but as a principal hirer "as if he had entered into the Hire-Purchase Agreement with the Owner in place of the Hirer". Under cl. 18 of the Guarantee Agreement, the Guarantor acknowledged and declared that: E F

> I/We hereby expressly acknowledge and declare that I/We are fully aware of all the provisions of the Hire Purchase Agreement and this Guarantee and fully understand the contents and effects thereof. G

[25] The guarantor clearly understood the contents of the respective agreements when he signed the Guarantee Agreement on 24 July 1999; he did so voluntarily and with open eyes, fully appreciative of the consequences of such an undertaking. H

[26] On the above reasoning, this court held that the requirement that the guarantee agreement must be signed by the guarantor in the presence of a Magistrate, a Commissioner for Oath or a Notary Public as stipulated under s. 22 of the Hire Purchase Act 1967 is not applicable to the facts of the present case. Therefore, the said guarantee agreement dated 24 July 1999 is valid and enforceable. I

A

Conclusion

[27] On the above considerations, this court unanimously makes the following orders:

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(a) in respect of Appeal No. W-02-1503-2009:

the appeal is allowed with costs of RM5,000 to the appellant (as agreed); and

(b) in respect of Appeal No. W-02-1590-2009:

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the appeal is dismissed with costs of RM5,000 to the respondent (as agreed).

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